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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 647

THE STATE OF WISCONSIN on the Relation of American Motors Corporation, a foreign corporation,

Respondent,

vs.

INDUSTRIAL COMMISSION OF THE STATE OF WISCONSIN,

Respondent,

ROBERT BORUM,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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RESTATED QUESTIONS

Respondents believe that the following questions more accurately phrase the issues to be decided by this Court than does the question set forth in the Petition for a Writ of Certiorari (p. 2).

1. Whether the decision and order of the Wisconsin Supreme Court dismissing petitioner's appeal to that Court as improperly taken from a non-appealable order of the Wisconsin Circuit Court, presents a federal question which the United States Supreme Court has jurisdiction to review.

2. If the answer to Question 1 is "yes", did the Wisconsin Supreme Court deprive appellant of life, liberty or property, without due process of law by dismissing his appeal from an order for judgment, which was not an appealable order within the scope of §274.33 of the Wisconsin Statutes?

STATEMENT OF CASE

Pursuant to Rule 40(3) of the Revised Rules of this Court, it is necessary to supply significant omissions in the statement of petitioner.

The Court will recognize from its decision in *Robert Borum v. Ind. Comm. of Wis.*, 368 U.S. 926 (1961), that the instant petition is the second effort to obtain a writ of certiorari in connection with the industrial accident of Robert Borum occurring on March 31, 1955. The following sequence of legal procedures employed by Borum through various attorneys, all connected with that injury, are hereinafter set forth in chronological order:

A. The Accident.

On the 31st day of March, 1955, Borum sustained an industrial accident while in the employment of American Motors Corporation, which resulted in personal injuries.

B. First Application.

On the 3rd day of May, 1955, Borum filed with the Wisconsin Industrial Commission a formal written application, through his then counsel, Roy O. Conen, 152 W. Wisconsin Avenue, Milwaukee, Wisconsin, by which he sought the adjustment of all claims that he might possess, under the provisions of the Wisconsin Workmen's

Compensation Act, for any injury that he sustained as a result of said accident.

C. First Hearing.

On the 7th day of September, 1955, a hearing was held before Examiner L. B. Retelle of the Industrial Commission. Following this hearing on the 7th day of October, 1955, said Examiner made certain findings of facts and issued an order directing American Motors Corporation to make certain payments of compensation to Borum and to make certain payments for his medical and hospital expense.

D. First Petition for Review.

Following the issuance of the said order, Borum filed with the Industrial Commission a petition for a review of the said findings and order, and on the 30th day of November, 1955, the Industrial Commission, acting as a body, issued a final order affirming, in all respects, the said findings and order of Examiner Retelle.

E. The Award Was Complied With.

American Motors Corporation complied with said order and made all of the payments therein required.

F. First Appeal to Circuit Court.

Borum, through new counsel, A. L. Tilton, 845 North 11th Street, Milwaukee, Wisconsin, commenced an action in the Circuit Court of Dane County on the 24th day of December, 1955, seeking a judicial review of said final order. Pending the hearing on this appeal, Attorneys Coggs & McCormick, 2679 North Teutonia Avenue, Milwaukee, took over the Circuit Court appeal from Attorney Tilton and handled it to a conclusion. On the 18th day

of April, 1958, the Honorable Edwin M. Wilkie, Circuit Judge of Dane County, filed a written decision directing that the findings and order of the Industrial Commission dated the 30th day of November, 1955, be confirmed and a judgment of confirmation entered. On the 19th day of May, 1958, a judgment was duly entered and filed in the Circuit Court of Dane County confirming, in all respects, said order.

G. First Supreme Court Appeal.

Subsequent thereto, Borum prosecuted an appeal from said judgment to the Supreme Court of the State of Wisconsin. The Brief of Borum's counsel fully apprised the Court of his claim of disability stemming from a psychoneurotic factor. Reply Briefs filed by counsel herein all discussed that matter. On the 2nd day of January, 1959, the Supreme Court of Wisconsin handed down and filed a written decision affirming, in all respects, the said judgment. *Borum v. Industrial Commission,* 6 Wis. 2d 168.

H. No Motion for Re-Hearing.

Borum filed no motion for re-hearing, and consequently the decision of the Supreme Court of Wisconsin became final on and after the 23rd day of January, 1959, pursuant to the provisions of §251.37 of the Wisconsin Statutes then obtaining.

I. Second Application.

On the 10th day of March, 1959, Borum, through Attorney H. R. George, 2364 North Twelfth Street, Milwaukee, Wisconsin, filed a second written application with the Industrial Commission in which he again sought the adjustment of all claims that he might have arising out of the accident of the 31st day of March, 1955. In

this second application, Borum specifically stated that his disability, for which compensation was being claimed, was due to a traumatic neurosis, arising out of injuries sustained in the accident that occurred on the 31st day of March, 1955.

J. Answer to Second Application.

In its answer to this second application, American Motors Corporation objected to the jurisdiction of the Industrial Commission and specifically set forth the multiple reasons why the Industrial Commission possessed no jurisdiction with regard to any issue or claim related to any injuries sustained by Borum as a result of the accident of the 31st day of March, 1955.

K. Hearing on Second Application.

On the 13th day of July, 1959, a hearing was held before Examiner G. W. Otto of the Industrial Commission. At this hearing, no testimony was offered, but an extensive statement was made into the record as to why the Industrial Commission possessed no jurisdiction with regard to any issue or claim that Borum might have because of any injuries sustained in the accident of the 31st day of March, 1955.

L. Order Following Second Hearing.

On the 4th day of September, 1959, Examiner Otto made certain findings of facts and issued an order directing that the application of Borum filed on the 10th day of March, 1959, be dismissed. The significant findings, upon which said dismissal order was based, were as follows:

> "The Examiner finds that the rights and liabilities of the parties were finally adjudicated . . . that the

Industrial Commission does not have jurisdiction with regard to any issue or claim related to the injury of March 31, 1955."

M. Second Petition for Review.

Thereafter, Borum, through Attorney A. L. Tilton, mentioned above, filed with the Industrial Commission a petition for review of said findings and order of the 4th day of September, 1959.

N. Final Order of the Industrial Commission.

On the 7th day of October, 1959, the Industrial Commission, acting as a body, made a final order affirming in all respects the said findings and order of Examiner Otto.

O. Second Appeal to Circuit Court.

Thereafter, on the 31st day of October, 1959, Borum commenced an action in the Circuit Court of Dane County, seeking a judicial review of said final order of the Industrial Commission of the 7th day of October, 1959. On the 13th day of October, 1960, the Honorable Norris Maloney filed a written decision directing that the findings and order of the Industrial Commission dated the 7th day of October, 1959, be in all respects confirmed. On the 9th day of November, 1960, pursuant to said written decision, a judgment was duly entered and filed in the Circuit Court of Dane County, confirming, in all respects, the said final order of the 7th day of October, 1959.

P. Second Appeal to Supreme Court.

Subsequent thereto Borum prosecuted an appeal from the second judgment to the Supreme Court of the State of Wisconsin. On the 2nd day of May, 1961, the Supreme

Court of Wisconsin handed down and filed a written decision affirming, in all respects, the said judgment. *Borum v. Ind. Comm.,* 13 Wis. 2d 570.

Q. Motion for Re-Hearing.

On May 19th, 1961, Borum moved for a re-hearing of the decision of the Supreme Court of Wisconsin of the 2nd day of May, 1961. The basis for this motion was that the failure of the Industrial Commission to accept jurisdiction and proceed on a second or subsequent application for additional compensation following a final award, was violative of both Article I, Sec. 9 of the Wisconsin Constitution, and Article XIV, Sec. 1 of the United States Constitution.

R. Motion for Re-Hearing Denied.

On the 27th day of June, 1961, the Supreme Court of the State of Wisconsin denied the motion for re-hearing.

S. Petition for Writ of Certiorari.

On the 23rd day of September, 1961, Borum filed a petition in the Supreme Court of the United States of America for a writ of certiorari to the Supreme Court of Wisconsin.

T. Petition Denied by United States Supreme Court.

On the 4th day of December, 1961, the Supreme Court of the United States of America denied Borum's petition for a writ of certiorari. 368 U.S. 926.

U. Third Application.

On the 11th day of March, 1964, Borum, through Attorney Lloyd A. Barbee, 2606 West Fond du Lac Avenue, Milwaukee, Wisconsin, filed a third written application with the Industrial Commission in which he once again sought the adjustment of all claims that he might have arising out of the accident of the 31st day of March, 1955. The Industrial Commission scheduled a hearing on said application to determine whether it had jurisdiction with respect to the matters alleged in the third application for the 28th day of April, 1964.

V. Alternate Writ of Prohibition Obtained.

A petition of one of the attorneys for American Motors Corporation for an alternative writ of prohibition commanding the Industrial Commission to refrain from further proceedings with respect to the third application pending a hearing before the Court on April 22, 1964, was presented to the Honorable Richard W. Bardwell, presiding Judge of the Circuit Court for Dane County, Wisconsin, on the 14th day of April, 1964. On the same day, an order for issuance of the alternative writ of prohibition was signed by Judge Bardwell, and an Alternative Writ of Prohibition immediately issued from the clerk of said court. Copies of said Writ were served upon the Secretary of the Wisconsin Industrial Commission and Attorney Barbee, attorney for Borum.

W. Judgment Granted Allowing Absolute Writ of Prohibition.

On the 22nd day of April, 1964, a hearing was held before Circuit Judge Bardwell with respect to the order of the Court directing the Industrial Commission to show cause why it should not be restrained from further pro-

ceedings with respect to the third application. Borum did not appear at said hearing, nor did any attorney on his behalf. After hearing a representative of the Industrial Commission, and counsel for American Motors Corporation, the Court ordered that an Absolute Writ of Prohibition issue, and signed such an Order Granting Judgment, in accordance with the provisions of Wis. Stat. §293.12, on April 24, 1964. Judgment allowing the absolute writ of prohibition was then immediately signed by the clerk of Circuit Court for Dane County on the same date. Copies of said Judgment were served on the Secretary of the Industrial Commission and Attorney Barbee, attorney for Borum, on the same date.

X. Appeal is From Order, Not Judgment.

On the 3rd day of June, 1964, Attorney Barbee served "Notice of Appeal to Supreme Court" upon counsel for American Motors Corporation. In said notice it was stated that the appeal was from the *Order* of Judge Bardwell dated April 24, 1964. By communication of July 16, 1964, Franklin W. Clarke, Clerk of the Supreme Court of Wisconsin, advised the attorneys for American Motors Corporation that the record had been filed with the Wisconsin Supreme Court on said date.

Y. Respondents Moved to Dismiss Appeal.

On July 24, 1964, a motion of American Motors Corporation to dismiss the attempted third appeal of Borum to the Wisconsin Supreme Court was served upon Borum's counsel. The motion was served on the Wisconsin Attorney General and filed with the Clerk of the Wisconsin Supreme Court on July 27, 1964.

Z. Third Appeal to Wisconsin Supreme Court Dismissed.

On September 4, 1964 the Clerk of the Wisconsin Supreme Court announced they had dismissed the attempted appeal on that date.

ARGUMENT

THE DECISION OF THE WISCONSIN SUPREME COURT WAS BASED ON AN ERROR OF PROCEDURE MADE BY PETITIONER. AS A CONSEQUENCE, NO FEDERAL QUESTION IS PRESENTED FOR REVIEW.

The instant Petition contains no new arguments in support of it, not contained in the Petition filed on October 23, 1961. It does reflect the same jurisdictional deficiencies apparent in the earlier Petition. There is no specification of or reference to the stage in the extended litigation before the Industrial Commission or the Courts at which any federal question was timely and properly raised by petitioner. There is no showing that the Wisconsin Supreme Court passed upon any federal question in dismissing the appeal of petitioner to that forum. These failures constitute violation of Rule 23(1)(f) of the Revised Rules of this Court. The points and authorities contained in the Brief of the respondent filed with this Court in accordance with Rule 24 and in opposition to the earlier Petition, are applicable here.

However, mention is made of *Booth Fisheries Co. v. Ind. Comm.*, 271 U.S. 208 (1926), where this Court, in affirming the decision of the Wisconsin Supreme Court (185 Wis. 127, 200 N.W. 775 (1924)), held that a litigant electing to accept the benefits of the Wisconsin Workmen's Compensation Act could not escape its burdens by

asserting that it is unconstitutional. This precedent was relied upon by respondents in defeating the motion for rehearing brought by Borum in the Wisconsin Supreme Court after the second of his three unsuccessful appeals to that Court.

An additional reason for the denial of the instant Petition is manifest on the face of it. Appendix B (p. 10), reflects that the Wisconsin Supreme Court granted the motion of respondents to dismiss the appeal of Petitioner. If Rule 21(1) of the Revised Rules of this Court has been observed by petitioner, the record on file herein would show the basis for that motion. The motion to dismiss the appeal was predicated on the fact that the attempted appeal to the Wisconsin Supreme Court was taken from a non-appealable order for judgment of the Circuit Court of Dane County. Because the appeal was not properly taken from the judgment allowing the writ of prohibition absolute, it did not conform to §274.33 of the Wisconsin Statutes. The statute permits appeals from only those orders preventing judgments from which appeals could otherwise be taken.

The Wisconsin Supreme Court had no alternative but to dismiss the appeal because of the procedural irregularity, and thus could give no consideration to the substantive aspects of the appeal. Clearly, the Wisconsin Supreme Court did not consider any federal aspect in reaching their decision.

Because the action of the State Court is supported by Wisconsin statutory law governing appellate practice, no federal question is presented which would permit review by this court. The cases so holding are abundant, and the following citations are merely representative.

Ellis v. Dixon, 349 U.S. 458 (1955);

Hedgebeth v. N. Carolina, 334 U.S. 806 (1948);

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945);

Milk Wagon Drivers Union of Chicago Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941);

Texas & New Orleans R.R. Co. v. Miller, 221 U.S. 408 (1911);

Northern Pacific Railroad Co. v. Patterson, 154 U.S. 130 (1894);

Tripp v. The Santa Rosa Street Railway Co., 144 U.S. 126 (1892);

French v. Hopkins, 124 U.S. 524 (1888).

The requirements of Title 28, U.S. Code, §1257, are not satisfied by the instant petition. There is no jurisdictional basis on which to grant the relief sought therein.

CONCLUSION

For the reasons stated, the United States Supreme Court does not have jurisdiction to grant a writ of certiorari in response to the Petition. It is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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